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NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondent.

Petition on Behalf of Hettie M. Minnicks,
as Executrix of the Succession of Stephen A. Mistich
For Writ Of Certiorari To The Louisiana State Court
Of Appeals, Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

In a Jones Act and general maritime law personal injury case in state court under the "saving to suitors" clause, when the plaintiff seaman dies after award of a trial court judgment in his favor but before decision on the defendant's appeal:

1. Does federal maritime law or state law determine who is the proper beneficiary of the judgment and who is the proper party to be substituted for the deceased seaman.

2. Does federal maritime law designate the seaman's estate as the proper beneficiary of the judgment, and designate his personal representative, the executrix of his estate, as the proper party to be substituted for the deceased seaman.

PARTIES TO THE PROCEEDINGS

Hettie M. Minnicks
Brown and Root, Inc.*
Brandon L. Mistich
Rebecca Mistich Terrase
Patricia Monroe Mistich, as natural tutrix of Shawn A. Mistich

*Its parent company is Halliburton, Inc.; its partially owned subsidiaries are:

Brown & Root Constructores Petroleros
de Venezuela, C.A.
Brown & Root Do Brasil Servicos Maritimos Ltda.
Brown & Root Ingenieros Petroleros de Venezuela, C.A.
Brown & Root (Malaysia) Sdn. Bhd.
Brown & Root - Malta Limited
Brown & Root Nigeria Limited
Brown & Root - Saudi Limited
Constructora Indolatina, S.A. de C.V.
Constructores de Venezuela, Brown & Root, Inc., C.A.
Halliburton Holdings, Inc.
Manteniven, S.A.
Martec-Engenharia & Obras Ltda.
P.T. Brown & Root Indonesia
SBR Offshore Limited

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1. April 28, 1989 judgment in favor of original plaintiff Stephen A. Mistich in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, Case Number 29-703, *Stephen A. Mistich v. Pipelines, Inc., et al.* (Appendix, page A-1)

2. January 8, 1990 order of the Louisiana Court of Appeal, Fourth Circuit, Case Number 89-CA-1420, *Stephen A. Mistich v. Brown & Root, Inc.*, substituting the children Brandon L. Mistich et al. in place of the deceased original plaintiff. (Appendix, page A-4)

3. June 1, 1990 denial by the Louisiana Court of Appeal, Fourth Circuit, in the same case of the executrix's motion to be substituted as proper party plaintiff-appellee (Appendix, page A-6)

4. September 14, 1990 denial of application for supervisory and other writs by the Supreme Court of the State of Louisiana, Case Number 90-C-1241, *Stephen A. Mistich v. Brown & Root, Inc.*, (page A-7)

JURISDICTION

Sought to be reviewed is the June 1, 1990 order of the Louisiana Court of Appeal, Fourth Circuit, denying the right of the deceased seaman's executrix to be substituted for the seaman (Appendix, page A- 6). The Louisiana Supreme Court denied the executrix's application for supervisory and other writs on September 14, 1990 (Appendix, page A-7).

Suit was originally brought in 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, Case Number 29-703, under the Jones Act, 46 U.S.C. Section 688, the general maritime law, and the "saving to suitors" clause, 28 U.S.C. Section 1333 (1). In this Jones Act and general maritime law case, the seaman brought suit for and was awarded damages

caused by his employer's negligence and the unseaworthiness of the vessels on which he was employed. Jurisdiction in this Court is founded upon this Court's final review of admiralty and maritime causes, United States Constitution, Article III, Section 2, Clause 2, and upon 28 U.S.C. Sections 1257 and 2104.

STATUTES INVOLVED

1. U.S. Constitution, Article I, Section 8, Clause 3 (Commerce)

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

2. U.S. Constitution, Article III, Section 2, Clause 1 (Admiralty and Maritime Jurisdiction)

[1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all cases affecting Ambassadors, other public Ministers and consuls;-to all Cases of admiralty and maritime Jurisdiction;-to controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and citizens of another State;-between Citizens of different States,-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

3. U.S. Constitution, Article VI, Clause 2 (Supremacy)

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. 46 U.S.C. Section 688

688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which is principal office is located.

5. 28 U.S.C. Section 1333

1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

6. **Federal Rule of Appellate Procedure Rule 43. Substitution of parties**

(a) Death of a party.-If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the

representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

7. **Federal Rule of Civil Procedure Rule 25. Substitution of Parties**

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the records by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

8. Uniform Rules of Louisiana Courts of Appeal, Rule 2-9

Rule 2-9. Substitution of Parties

The rules and procedures for substitution of parties

provided by LSA-C.C.P. Arts. 801-807 shall regulate the substitution of parties.

9. Louisiana Code of Civil Procedure Article 801

Art. 801. Voluntary substitution for deceased party; legal successor

When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.

As used in Articles 801 through 804, "legal successor" means:

(1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and

(2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein.

10. Louisiana Civil Code Article 2315.1

Art. 2315.1. Survival action

A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse of the child or children;

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving; and

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi-offense, may be urged by the decedent's succession representative in the absence of any class of beneficiary set out in the preceding Paragraph.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child," "brother," "sister," "father," and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

STATEMENT OF THE CASE

The original plaintiff, seaman Stephen A. Mistich, filed suit on December 2, 1986 against defendant Brown and Root, Inc. and other defendants under the Jones Act and the general maritime law. The suit was for personal injury damages resulting from plaintiff's employment by defendants as a welder on pipe-laying vessels. Suit was filed under the saving to suitors clause in 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana. All defendants except Brown and Root, Inc. settled with plaintiff and were dismissed prior to trial.

On April 28, 1989, after trial on the merits, judgment for $7,147,608.00 was rendered in favor of the original plaintiff while he was alive. Then *after judgment* he died on May 14, 1989. Thus here there is no survival or wrongful death action involved. The plaintiff's personal injury cause of action was merged into his judgment. The judgment was simply his property right and at death became an asset of his estate.

Defendant Brown and Root, Inc. took a suspensive appeal to the Louisiana Court of Appeals, Fourth Circuit. On

January 4, 1990 the adopted children of the plaintiff, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia Monroe Mistich as natural tutrix of Shawn A. Mistich, filed a motion to be substituted for the deceased plaintiff in the appeal as parties plaintiff-appellees. This motion was based on Rule 2-9 of Uniform Rules of Louisiana Courts of Appeal, (substitution), which referenced Louisiana Code of Civil Procedure Article 801 (trial court substitution), which referenced Louisiana Civil Code Article 2315.1 (*survival* of tort actions). On January 8, 1990 the Court of Appeal ordered said children substituted in place of the deceased original plaintiff.

On April 4, 1990 Hettie M. Minnicks, the mother of the deceased original plaintiff, was confirmed as ancillary executrix for his Louisiana succession. On the same day she filed a motion to be substituted in the appeal as the sole proper party plaintiff-appellee.

On June 1, 1990 the Court of Appeal denied the executrix's motion to substitute, citing only *Nathan v. Touro Infirmary*, 512 So.2d 352 (La. 1987), a Louisiana Civil Code Article 2315 *survival* action case. Subsequently, on September 14, 1990, the Louisiana Supreme Court without explanation declined to grant supervisory or other writs to the Court of Appeal.

On November 14, 1990 the executrix sought to intervene. The children opposed claiming to be ultimate beneficiaries as well as proper procedural parties.

The seaman had previously been diagnosed as suffering with terminal leukemia and as having only a very limited time remaining to live. He, shortly before the trial and his subsequent death, executed on March 3, 1989 a last will and testament which substantially excluded his adopted children and left most of his estate to three of his closest relatives: his mother, sister, and brother.

The deceased had no wife or natural children. The adopted children were his former wife's children from her prior marriage. The plaintiff had adopted them only eleven months before he and his former wife separated on November 1, 1980.

They were formally divorced on April 19, 1982 with the wife not seeking nor being awarded child or other support, but receiving full custody of the children. Thereafter he did not provide financial support to the children nor did they support him when he was in need. He had had no significant contact with them for several years before his death. Had he lived past appeal, they would not have received any part of this judgment. There is no reason why they should now, just because he died pending appeal.

If the state court order on the substitution issue determines the ultimate beneficiaries of this personal injury lawsuit, then the most significant property right possessed by the plaintiff-seaman at his death, his maritime personal injury judgment, will not be distributed according to his will. On the other hand, if this personal injury judgment is a right of his estate, it will be transmitted according to his solemn will to legatees other than his children. Whether these children are proper survival or wrongful death beneficiaries is another question completely unrelated to the case herein. Under federal law the judgment is a property right of the estate, being the fruits of the seaman's own federal maritime personal injury action. A subversion of the express will of the deceased seaman through the application of state law to this federal maritime case must not be allowed.

Clearly had the plaintiff survived past the appeal and then he died after recovering on his judgment, these funds as part of his estate would be distributed according to his testament. In fact, the funds from the plaintiff's pre-trial settlement with the other defendants were sent, without objection, to the estate. Is it reasonable that the *actions of the defendants* in settling or in appealing should *determine the ultimate beneficiary* of the plaintiff's federal maritime rights? For, if the defendant had settled or had not appealed, the recovery would have been *without challenge* an asset of the seaman, and at his death, of his estate. It is submitted that this Court should preserve the seaman's rights to his estate and preserve the needed uniformity of substantive rights under federal maritime law.

FEDERAL QUESTION RAISED TIMELY

The federal questions sought to be reviewed were raised in Petitioner's June 26, 1990 application to the Supreme Court of the State of Louisiana for supervisory and other writs. There on page 4 Petitioner stated that the sole proper party for substitution in place of the deceased seaman was his personal representative, the executrix, since "*Federal maritime claims in state court under Saving to Suitors clause as to substantial rights must be governed by Federal law.*"

ARGUMENT

I. *Whether federal maritime law or state law should determine who is the proper beneficiary of the judgment and who is the proper party to be substituted for the deceased seaman.*

Two of the considerations in favor of granting certiorari are presented by this petition: a conflict between the state court action and Federal Courts of Appeals; and a conflict between the state court action and this Court. See Supreme Court Rules 10.1 (b) and (c).

In this case the state court has applied Louisiana law to determine the questions of proper substitution and ultimate beneficiaries under the Jones Act, 46 U.S.C. Section 688, and general maritime law. The state court has *not* held that the parties ordered substituted for the deceased seaman have merely the *procedural* capacity as the parties plaintiff-appellees to appear in and control that side of the appellate litigation. Nor have the state courts held that the ultimate beneficiary of the judgment would be the seaman's estate. The two motions to substitute and the briefs of all parties regarded the party substituted as both the

ultimate beneficiary of the seaman's judgment, and also as the party with procedural capacity to litigate the judgment on appeal. It is Petitioner's position that federal law should apply to both questions and so this petition and argument is aimed to address both.

The state court order clearly conflicts with decisions of this Court, of the United States Courts of Appeals, and of other courts which have uniformly held that, in maritime actions in state court under the saving to suitors clause, federal maritime law governs over state law which interferes with substantive maritime rights.

Excluded from this discussion are distinguishable cases where state law has not been preempted in maritime cases because of recognized exceptions not present in the instant case[1]. Distinguished first are cases where state law is *adopted* to fill the gaps where there is no federal law on point by virtue of the interstitial nature of federal law, *e.g. Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), and *Baggett v. Richardson*, 473 F.2d 863 (5th Cir. 1973). Distinguished second are cases where the state law regulates behavior in which the state has an especially strong regulatory interest or in a "maritime but local matter", *e.g. Askew v. American Waterways Operators*, 411 U.S. 325, 93 S.Ct. 1590, 35 L.Ed.2d 280 (1972).

A. Federal maritime law, not interfering state *substantive* law, governs a seaman's substantive maritime rights.

It has long been held that federal maritime law governs all substantive rights in cases falling within the admiralty and maritime jurisdiction of the federal courts, to the exclusion of interfering state law. See *Chelentis v. Luckenbach S.S. Co., Inc.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918), quoting

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[1] See *Exxon Corp. v. Choo*, 817 F. 2d 307 (5th Cir. 1987) (*reversed on other grounds*), 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) for a discussion of these recognized exceptions.

Southern Pacific Co. v. Jensen, 244 U.S. 205, 215, 216, 37 S.Ct. 524, 528, 61 L.Ed. 1086 (1917) with reference to the Constitution Article I, Section 8, Clause 3 (Commerce) and to Article III, Section 2, Clause 1 (Admiralty):

> [I]t must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. * * * and further, that in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.

In the *Chelentis* case, this Court stated further that the "saving to suitors" clause[2]:

> [G]ave no authority to the several states to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." (further quoting *Southern Pacific Co. v. Jensen, supra).*

In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920), this Court held that state workers compensation laws constitutionally could not take away substantive federal maritime rights. The Federal Circuit Courts of Appeals have likewise held that federal law, not state law, governs substantive maritime rights: *Moore-McCormack Lines, Inc. v. Amirault*, 202 F.2d 893 (1st Cir. 1953) (allowance of

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[2] 28 U.S.C. 1333 (1). See *Madruga v. Superior Court*, 346 U.S. 556, 560, n. 12, 74 S.Ct. 298, 300, n.12, 98 L.Ed. 290 (1954).

prejudgment interest determined by federal law in general maritime personal injury and property actions); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971) (Defendant's standard of care determined by general maritime law); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974) (a general maritime personal injury case not governed by Arkansas state statute limiting recovery by social guests on boats to wilful and wanton disregard); *Pastore v. Taivo Gyogzo*, 571 F.2d 777, 784 (3rd Cir. 1978) (questions of contribution and indemnity rights governed by federal not state law).

The cases that hold that questions of indemnity in Jones Act and saving to suitors clause cases must be decided under federal law are the perfect counterparts to what is involved in this case. Indemnity has to do with *who* will be ultimately liable; and this case has to do with *who* will be the ultimate beneficiary of the recovery.

It is a "constitutional truism" that "state legislation is clearly invalid where it actually conflicts with the established general maritime law or federal statutes." States may not "flatly contradict established maritime law" nor "interfere with the uniform working of the federal maritime legal system." Gilmore and Black, *The Law of Admiralty* (2d ed. 1975), Section 1-17, pages 48-50. The saving to suitors clause "does not authorize the application of substantive rights created by state statutes that significantly modify or change the national substantive maritime law that otherwise would be applicable." Wright, Miller & Cooper, *Federal Practice and Procedure* (1985), Section 3672.

In the instant case, Louisiana Civil Code Article 2315.1 designated the state *survival* action beneficiaries as the parties to be substituted on appeal after the personal injury judgment in favor of the seaman. These same survivorship provisions were previously contained in Civil Code Article 2315 and were held to be a "rule of substantive law." These same state law provisions were also held, under the Constitution, Articles VI (Supremacy) and III, Section 2 (Admiralty) not to apply to a federal maritime personal injury claim. See *Roberson v. N.V. Stoomvaart*

Maatschappij, 507 F.2d 994 (5th Cir. 1975).

Also see *Taylor v. Taylor*, 232 U.S. 363, 34 S.Ct. 350, 58 L.Ed. 638 (1914), A FELA wrongful death and survival actions case holding that the New York State succession law was preempted by the FELA grant of the right of action to specified parties. Similarly in our case Federal law clearly placed the substantive judgment right in the executrix, as the personal representative of the deceased seaman, and this right is supreme over any interfering state law.

An analogy could be drawn to a *wrongful death* or *survival* Jones Act and general maritime law claim filed under the saving to suitors clause in the court of a state whose laws designated his cousin as the designated beneficiary of the action. Surely we would not suffer the argument that state law should dislodge the Jones Act and general maritime law designated beneficiaries. In all three situations (wrongful death, survival, and the present case) the question is the same. The public policy of uniformity represented by a single maritime rule as to who substitutes for a plaintiff who dies *after* judgment, and as to who ultimately recovers in such a case, carries a strong regulatory interest of the United States, not of the individual states. These matters of federal law require uniform application to facilitate maritime commerce. Further, the question of a beneficiary's right of action is surely a matter of substance, not procedure.

B. Federal maritime law, not interfering state *procedural* law, governs a seaman's substantive maritime rights.

Assuming *arguendo* that the interfering state law is procedural, still the estate's entitlement to the judgment the seaman obtained while alive is a substantive maritime right, and so federal maritime law would govern over interfering state procedural law.

See *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942) (maritime law governs the burden of proof on validity of seaman's release of rights).

Garrett, as here, was a Jones Act personal injury claim brought in state court under the saving to suitors clause. It reversed the Pennsylvania Supreme Court which had held as procedural and determined under state law the question of the burden of proof on whether a seaman's release was valid. *Garrett* held this matter substantive *in its effect* and so controlled by federal law, stating:

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * * So here, in hearing this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Similarly, this Court refused to apply Pennsylvania state contributory negligence law to a general maritime law unseaworthiness and negligence claim, as here, in place of maritime comparative negligence. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 205, 98 L.Ed. 143 (1953) stated:

> While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.

In *Pope*, this Court stated that a maritime tort is "a type of action which the Constitution has placed under national power to control in its substantive as well its procedural features," quoting

Panama R. Co. v. Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 393, 68 L.Ed. 748 (1924). *Panama*, as here, was a Jones Act personal injury suit.

The Federal Courts of Appeals have followed this same course. *J.B. Effenson Co. v. Three Bays Corp., Ltd.*, 238 F.2d 611, 615 (5th Cir. 1956) held that a maritime right is governed as to a limitation of actions issue "by the maritime law.", explaining:

> Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction, have declared and would apply. * * * The maritime principles would prevail even though the action were brought in a state court. (citation omitted) They are "common law remedies" which may be had, where available, but maritime rights which are redressed.

Similarly, in *Oroz v. American President Lines, Ltd.*, 259 F.2d 636, 638 (2nd Cir. 1958), the issue of the time within which a general maritime law personal injuries suit must be commenced was held governed by general maritime law, not a local state statute of limitations. This was the case even though the statute of limitations was characterized as procedural under state law. It was stated that:

> Admiralty principles govern the civil action and override common law rules such as those concerning contributory negligence, burden of proof, and assumption of the risk even though these rules are often characterized as "procedural" or "remedial."

The 3-year Federal statute of limitations, not the 6-year Maine state law, governed a maritime personal injury action in *Butler v. American Trawler Co.*, 887 F.2d 20, 21 (1st Cir. 1989). The court stated:

> [T]he relevant question is not whether the federal limitations statute (citation omitted) is "substantive"

> or "procedural," but whether Congress intended that statute to preclude the operation of different state limitations statutes in respect to maritime torts. We believe that it did.

J. Ray McDermott & Co., Inc. v. Vessel Morning Star, 457 F.2d 815, 818 (5th Cir.) (en banc), cert. denied, 409 U.S. 948, 93 S.Ct. 271, 292, 34 L.Ed.2d 218 (1972), a maritime contract case, held that a maritime statute, "when read together with the statutes delineating the judicial sale procedure in the federal courts, forms a comprehensive *procedure*." There the Louisiana deficiency judgment statute was not allowed to affect the "uniform *application*" of the federal maritime statute (emphases added).

In *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981), a general maritime law personal injury case establishing a federal admiralty rule on interspousal immunity and declining to look to local state procedural law, the court stated:

> A state law, even though it does not contravene an established principle of admiralty law will, nevertheless, not be applied where its adoption would impair the uniformity and simplicity which is a basic principle of the federal admiralty law (citation omitted).

In *Genetics International v. Cormorant Bulk Carriers, Inc.*, 877 F.2d 806 (9th Cir. 1989), the court held that a set-off against payment of freight charges is determined by federal maritime, not state law.

In *Daughtry v. Diamond M Co.*, 693 F.Supp. 856, 863 (E.D. Cal. 1988), the court applied federal law, not state procedural statutes dealing with good faith in settlements among joint tortfeasors, in a maritime Jones Act case. Here the court said that "[T]o subject maritime co-defendants to varying rules of liability would violate a policy behind federal maritime law, that is, to create uniform rules which tend to facilitate maritime commerce." This was so even though the state provisions were clearly procedural in nature. *Ciolino v. Sciortino Corp.*, 721 F.Supp. 1491, 1495 (D. Mass. 1989), a Jones Act and general maritime

law personal injury case, stated "because federal substantive law controls the decision of this case, this court should apply" the federal *procedural* rule on relation back of amended complaints to an earlier date.

This Court itself in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222, 223, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986), supporting the uniformity of federal maritime law, referred to the "saving to suitors" clause which:

> [A]llows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse - *Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards. (citations omitted)

Exxon Corp. v. Choo, 817 F.2d 307 (5th Cir. 1987), *reversed on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), a maritime wrongful death case, involved a conflict between state and federal procedural rules of *forum non conveniens*. Referring to *Offshore Logistics, Inc., supra*, the court stated at 817 F.2d 319 that when state court procedures conflict with maritime law "it is clear that they must yield." The court explained, *"The "reverse -* Erie*" question is whether the inconsistent state law, whether deemed a matter of substance or procedure, conflicts with maritime law."* (emphasis added) The *Exxon* court analyzed the factors favoring maritime law preemption of state law. Relevant here is the uniformity factor *i.e.:*

> Whenever a uniform rule will facilitate maritime commerce, or, conversely, when non-uniform regulation will work a material disadvantage to commercial actors.***A corollary of this concept is the notion found in the *J. Ray McDermott & Co.* [*supra*] test of "characteristic features" or core principles of the maritime law. (citation omitted)

> Applying state law inconsistent with "characteristic features" would defeat the reasonably settled expectations of maritime actors.***Since uniformity is related to predictability and to reasonable legal expectations, it is of greatest importance when legal relations are not predictably related to a certain locale and its laws.

All this is generally true for maritime commerce and particularly true for the type of offshore maritime activities here, involving varied party and vessel locations.

Needed uniformity would surely be compromised if the law of each state could dictate who is to be the ultimate beneficiary of Jones Act and general maritime law personal injury actions. In this same way needed uniformity would be compromised if each state could dictate the ultimate beneficiary in maritime wrongful death and survival actions.

Would not a significant lack of uniformity exist in allowing seaman Smith in State A to determine through his testament the ultimate beneficiary of his maritime rights recovery, but in denying this right to seaman Jones in State B?

If the several states apply varying rules, how will persons against whom maritime claims are made know the proper claimant for redress? As herein, how will defendants know the proper party with whom to discuss settlements of judgments on appeal? Maritime substantive rights and duties must not form a patchwork across the nation. Substantive uniformity is needed here and throughout federal maritime law. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339, (1970); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629-631, 79 S.Ct. 406, 409, 410, 3 L.Ed.2d 550, (1959); *Miles v. Melrose*, U.S. S.Ct. No. 89-1158, decided Nov. 6, 1990.

In the shadow of federal supremacy, a conflicts of law situation exists, and further authorities support your petitioner's position. See *Restatement (Second) of Conflict of Laws*, (1971), Section 122, Comment a., discussing the application of forum local law rather than the law of the jurisdiction under which the

right originated. One factor favoring the original jurisdiction's law would be if the application of the local law "would be likely to affect the ultimate result of the case." A second factor, the classification of the issue as "substantive", also favors applying the original jurisdiction's law (here federal). The other two factors discussed are not relevant here. Also see *Restatement* Section 125, Comment a., stating "the local law of the forum as such will not... be applied when its application would substantially affect the rights and duties of the parties." Also see Edward S. Stimson, *Conflict of Laws (1963)* stating at page 28 "the true objective of conflict of law rules is that the outcome of the suit should be the same regardless of the jurisdiction in which it is brought," and on page 29 stating "if there is doubt as to whether the law applied will affect the result, the law of the forum should *not* be applied." (emphasis added) Surely a forum law determining the ultimate beneficiary of the personal injury action affects the "outcome" and the "result" of the case.

Finally, see W. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933) at page 344 characterizing the correct test as "How far can the court of the forum go in applying the rules taken from the foreign system of the law without unduly hindering or inconveniencing itself?" At page 349 Cook distinguishes between primary rights, secondary rights (both considered substantive), and tertiary (remedial or procedural) rights having to do with the mode of enforcing the prior existing and violated rights. In the instant case your petitioner's right to the judgment, as the personal representative of the deceased seaman who was awarded that judgment, is clearly substantive and may not be rightfully taken from her under a state forum procedure. Such rights of a seaman, as "ward of the admiralty" must be protected from encroachment. See *Garrett v. Moore-McCormack Co., supra*, concerning the special protection afforded to the rights of seamen.

II. ***Whether under federal maritime law the proper beneficiary of the judgment is the seaman's estate, and the proper party to be substituted for the deceased seaman is his***

personal representative, the executrix of his estate.

Under federal maritime law the estate of the deceased is the proper party in interest when the plaintiff dies after obtaining a judgment in his favor. In the present case, the state court applied state law to find that the survival beneficiaries under a state tort statute, Louisiana Civil Code Article 2315.1, were the proper parties to substitute for the deceased. But clearly survival statutes, state or federal, are irrelevant to the present case in which the deceased seaman obtained a judgment before his death. *In effect*, the state court has made this case a *survival* case because the survival statute designated the ultimate beneficiary. It is important to distinguish the instant case from a survival or wrongful death action.

A. Not survival or wrongful death action.

Although addressing La.C.C.Art. 2315 and its survival provision now contained in Art. 2315.1, one commentator has noted about the nature of survival actions in general:

> Certainly if the victim brings a suit and recovers an award for his injuries and then dies, the beneficiaries' survival action is merged into the prior judgment . . . Since the beneficiaries are merely procedural representatives to assert a claim which the victim would have asserted if he were alive, they cannot assert a claim which the victim has already litigated and lost [or won].

Johnson, Death On The Callais Coach, 37 La.L.Rev. 1, 48 (1976). The point is that "survival" has to do with the action the victim could have brought to judgment but was prevented from so doing because of death. If he has brought the action to a judgment, then there is simply no action to survive. The victim has already before his death merged his action into a judgment. The point of survival is to prevent the death of the victim from eliminating a rightful action. If he has already obtained the judgment, then survival, *by its very nature*, does not apply. Comment, Survival Of Actions In Article 2315 of the Louisiana Civil Code: The Victims Action And The Wrongful Death

Action, 43 Tulane L.Rev. 330, pages 335-336 (1969).

In a survival case under federal law the enumerated beneficiaries named in the survival statutes or jurisprudence are those in whose favor the action lies (that is, any recovery will ultimately go to these beneficiaries). But in a case where the deceased had initiated his action during life and had obtained judgment in his favor before his death, this judgment is his property right and at his death becomes part of his estate to be distributed in accordance with the intestate or testate succession laws. *Connors v. Gallick*, 339 F.2d 381, 386 (6th Cir. 1964). *Connors* was a Federal Employers Liability Act (FELA) case involving a railroad employee who died after receiving a trial court judgment and pending appeal. The Court noted that the employee's causes of action had been "merged into his judgment and that the judgment "became part of his estate." Also see *Vincent v. Sharp*, 9 La.Ann. 463 (1854), and Harper, James and Gray, *The Law of Torts*, 2d Ed., (1986), Vol 4., Section 24.6, pages 471-480. In *Seaboard Air Line Ry. Co. v. Oliver*, 261 F.2d 1 (5th Cir. 1919), cited in *Connors, supra*, a case directly on point dealing with the FELA, the court addressed the question of whether Section 59 of the act (the "survival" provision added in 1910 by amendment), could apply after the deceased had recovered a judgment for his personal injuries during his lifetime. The court found that it could not because the *employee's right of action* must "survive" to invoke Section 59, and under the circumstances, the right of action had been terminated by the judgment. The right of recovery was merged in or extinguished by the judgment. Also see 99 A.L.R. at 1091, Schumacher, Rights Of Action Under Death And Survival Statutes, 23 Michigan L.Rev. 114 (1924); 22 Am.Jur. 2d, Death, Section 90-91 (1965); *Restatement (Second) Judgments*, Section 92.1 (1976), and Annot. Judgment In Favor Of Or Adverse To Person Injured As Barring Action For His Death, 26 A.L.R. 4th 1264 (1984).

B. Cause of action, merged into judgment, becomes property right of estate.

The time of the trial court judgment is the point at which

the seaman's cause of action becomes merged into his judgment as a property right of his estate, even though an appeal later be taken. *Siberell v. St. Louis - San Francisco Ry. Co.*, 9 S.W.2d 912 (S.Ct. Mo. 1928), was a FELA death case in which the widow beneficiary died after judgment while the case was on appeal and the court treated the judgment as a property right which vested in the deceased plaintiff's (widow's) estate. The court also treated the question as a "question of right, and not of procedure, depending upon the substance of the cause of action, and its solution must be sought in the statute giving the right of action", 9 S.W.2d at 917. The judgment vested in the plaintiff before she died. The court held the right of action merged in the judgment to be subject to the general law of property succession upon death. The court said further:

> [I]t is as obvious as it is elementary that a final judgment is the end of litigation. That which up to the moment of the entry of a judgment for the relief sought was a matter in controversy becomes an absolute debt of one party to the other. The cause of action then has ceased to exist, being merged in the judgment.

Also see 25A C.J.S. at 699:

> *After judgment* the right of the beneficiary is a vested property right which passes under the statute of descent and distribution like any other personal property . . . (emphasis in original)

If the judgment is reversed on appeal, of course, the judgment is then a nullity. But until then, it has full force and effect. 25A C.J.S. at 699. A judgment affirmed on appeal is "affirmed as of the date when it was rendered." *Coughan v. District of Columbia*, 106 U.S. 7, 11, 1 S.Ct. 37, 40, 27 L.Ed. 74, 76 (1882). Note that in a federal maritime tort case, as in federal cases generally, the judicial interest accrues from the date the trial court judgment is rendered, not the date the judgment is affirmed. 28 U.S.C. 1961 (a).

C. Federal maritime law.

Maritime law has been held, "even though the action were brought in a state court," to be "Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction, have declared and would apply." *J.B. Effenson Co. v. Three Bays Corp., Ltd., supra.* Had this case been heard in the Federal courts, Federal Rule of Appellate Procedure 43, Substitution of Parties, Subpart (a), "Death of a Party" would require the "personal representative of the deceased party", here the succession executrix, to be substituted as a party in place of the original plaintiff and federal law clearly provides that the ultimate party in interest is the estate of the deceased seaman. The only exception to this is in "survival" cases which are limited to instances where the seaman dies *before* obtaining judgment in his favor.

It has been held that under Federal Rule of Civil Procedure 25 (a.), the trial court rule on the substitution of parties on death, only the succession representative is the proper party to be substituted. In *Marcano v. Offshore Venezuela*, 497 F.Supp. 204, 206-208 (E.D.La. 1980), a federal maritime personal injury case, the court relied on the analogous requirement of procedural capacity in the Jones Act and the Federal Employers Liability Act[3].

Federal Rule of Appellate Procedure Rule 43 (a.) was in effect at the time of *Stein v. Sea-Land Services, Inc.*, 440 F.2d 1181 (5th Cir. 1971), where as here the seaman had received a trial court verdict in his lifetime for his personal injuries under the general maritime law of unseaworthiness. After the verdict the seaman died. Thereafter, during the appeal, his widow and administratrix of his succession was substituted for the decedent

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[3] Also see *Asklar v. Honeywell, Inc.*, 95 F.R.D. 419 (D.Ct. 1982), (a federal Age Discrimination in Employment Act case) holding that federal substituion of parties rules, "in an action based on federal substantive law..., control over inconsistent state statutes."

as plaintiff-appellee and the case was affirmed in her favor. Subsequently the widow for herself asserted additional claims for wrongful death and survival. *Sea-Land Services, Inc. v. Gaudet*, 514 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). In *Gaudet* this Court clearly differentiated between wrongful death and survival actions, on the one hand, and personal injury actions prosecuted to judgment by the plaintiff before death, on the other. There Justice Powell in his dissent at 94 S.Ct. 828, note 23, referred to the prior case and noted without objection that "because Gaudet's death intervened between the jury verdict and the appeal, his recovery went directly to his estate, not to him personally." That is, it was a foregone conclusion that, *because* the plaintiff died after verdict, the recovery was for his estate. The very reasoning upon which *Gaudet* is founded dictates that obtaining a personal injury judgment during plaintiff's lifetime cuts off a survival action for the same damages. That reasoning was that the injury action and the wrongful death action were totally distinct, *i.e.*, they were actions for different injuries to different persons and thus one did not exclude the other. Although this is true of wrongful death, it certainly is not true of survival, which is exactly the same as the personal injury claim and for the *same* damages to the *same* person. This supports the executrix's substitution herein and establishes the estate as the ultimate party in interest of the general maritime law judgment.

The instant case clearly is controlled by the holding of *Connors v. Gallick, supra*, which involved a railroad employee who died after a trial court verdict. Raised pending appeal was the question of whether the survivorship provision of the FELA (45 U.S.C. 59, incorporated by reference into the Jones Act), applied to a settlement by the employee's estate to the exclusion of his daughter. The court held that the survivorship provision did not apply. The judgment and the resulting settlement belonged to the employee's estate, the court stating (339 F.2d at 366):

> Gallick in his lifetime had prosecuted his own cause of action to judgment, and his death did not

> abate his action or vacate his judgment. ***Gallick died possessed not of an unlitigated cause of action, but of a judgment which became part of his estate.

This is dispositive of this Jones Act/FELA question.

CONCLUSION

Clearly the Louisiana court's action in this matter interferes with the necessary supremacy and uniformity of the substantive federal maritime law. No recognized exception justifies this interference with a substantive maritime right of the deceased seaman's estate. Such a conflict between federal and state courts must not be allowed to exist. Petitioner submits that the Louisiana court has erred, and that its action must be reversed. It is imperative that this Court grant certiorari, or order summary reversal to protect the judgment rights of the deceased seaman, and to preserve here the needed constitutional uniformity of federal maritime law.

Respectfully submitted,
FRANK H. WALK, JR.
FREDERICK W. SWAIM, JR.
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APPENDIX

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 29-703 DIVISION "B"

STEPHEN A. MISTICH
VERSUS
PIPELINES, INCORPORATED, ET AL.

FILED: APRIL 28, 1989 (SIGNED)
MERLENE M. BARTHELEMY
DEPUTY CLERK

JUDGMENT

This matter came on for trial on the 11th day of April, 1989 and concluded on the
20th day of April, 1989.

PRESENT: Lawrence D. Wiedemann, William Hazlaris and Mark A. Pivach, Attorneys for Plaintiff

James F. Holmes, J. Warren Gardner and Jeffrey Christovich, Attorneys for Defendant, Brown and Root, Inc.

The Court, after hearing the evidence, the argument of counsel, and considering the exhibits admitted into evidence by the parties, finds as a matter of fact, as follows:

Plaintiff, Stephen A. Mistich, was unnecessarily and improperly exposed to excessive levels of radiation as a seaman aboard vessels owned by Brown and Root, Inc., Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Services, Inc., and Santa Fe International, Inc., over the period June 11, 1976 - November 18, 1985.

The exposure to which plaintiff, Stephen A. Mistich, was subjected during his employments with Lennard Pipelines, Inc., Pipelines, Inc., and Sea-Con Services, Inc., was not causally related to plaintiff's condition because the employment periods were subsequent to the latency period for chronic myelogenous leukemia diagnosed on January 19, 1986.

The exposure period during plaintiff's employment with Santa Fe International, Inc. (seven days) is questionably related due to the latency period, but, if related, is de minimis when compared to the exposure period during plaintiff's extended employment with Brown and Root, Inc. over the period 1976 - 1984 (approximately 1073 days).

The Court finds, as a matter of fact, that Brown and Root, Inc. was negligent and that the various vessels owned by it on which plaintiff worked over the aforesaid period were unseaworthy. The court also finds, as a matter of fact, that the negligence of Brown and Root, Inc. was a cause-in-fact, and the unseaworthiness of Brown and root, Inc.'s vessels was the cause-in-fact of plaintiff's chronic myelogenous leukemia due to exposure to excessive levels of radiation; each of the aforesaid theories of fault contributing equally to plaintiff's injuries and damages.

The Court finds, as a matter of fact, that plaintiff did not contribute in any way to the injuries, or damage, sustained by him.

The Court apportions the fault of plaintiff's Jones Act/ General Maritime employers, as follows:

Brown and Root, Inc.	100%
Pipelines, Inc.	0%
Lennard Pipelines, Inc.	0%
Sea-Con Services, Inc.	0%
Santa Fe International, Inc.	0%

The Court finds that plaintiff is entitled to compensatory damages in the sum of THREE MILLION ONE HUNDRED FORTY-SEVEN THOUSAND SIX HUNDRED EIGHT AND

NO/100 ($3,147,608.00) DOLLARS, itemized as follows:

Past Medical	$ 73,298.78
Past lost wages	83,912.00
Future medical	186,000.00
Future lost wages	804,397.00
Past and Future physical	
Pain and suffering	800,000.00
Past and Future emotional	
injury, mental pain and suffering	1,200,000.00

The Court further finds, as a matter of fact, that the conduct of Brown and Root, Inc. was willful and in gross disregard of plaintiff's rights, and accordingly, awards to plaintiff punitive damages in the sum of FOUR MILLION AND NO/100 ($4,000,000.00) DOLLARS.

Finally, the Court utilizes its discretion and awards prejudgment interest from the date of judicial demand on one-half (1/2) of the amount awarded in compensatory damages, at the legal rate provided under Louisiana law, and herewith taxes all costs against defendant, Brown and Root, Inc.

JUDGMENT READ, RENDERED AND SIGNED at Pointe-a-la-Hache, Louisiana, this 28th day of April, 1989.

(SIGNED) EMILE E. MARTIN
JUDGE

IN THE UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

NO. 89-CA-1420

STEPHEN A. MISTICH
VERSUS
PIPELINES, INC., ET AL.

APPEAL FROM PLAQUEMINES 25TH
JUDICIAL DISTRICT COURT, NO. 29-703

MOTION FOR SUBSTITUTION OF PARTIES

NOW INTO COURT, through undersigned counsel, come Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, legal survivors of original petitioner, Stephen A. Mistich, who move of this Court to be recognized as party plaintiffs in this action pursuant to Louisiana Code of Civil Procedure Art. 801; Rule 2-9 of Uniform Rules - Court of Appeal; and Louisiana Civil Code Art. 2315.1, and upon suggesting the following:

I.

Judgment was rendered on April 28, 1989 in favor of original plaintiff, Stephen A. Mistich and against defendant, Brown & Root, Inc. in the above entitled action for damages.

II.

Original plaintiff, Stephen A. Mistich, died on May 14, 1989.

III.

There exists no surviving spouse of the deceased, Stephen A. Mistich.

IV.

Brandon L. Mistich, Rebecca Mistich Terrase and Shawn

A. Mistich are the sole surviving children of the deceased, Stephen A. Mistich, and therefore, the proper parties to be substituted in the appeal as per the authorities cited. Proof of their quality is attached as Exhibit 1 to this Motion.

Patricia A. Mistich is the natural mother and tutrix of minor Shawn A. Mistich. Proof of her capacity is attached as Exhibit 2 to this Motion.

WHEREFORE, surviving children, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, urge this Honorable court to recognize their right of substitution under the authorities previously cited, and that they be substituted as party plaintiffs and appellees herein for original plaintiff, now deceased, Stephen A. Mistich.

IT ORDERED that Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, survivors of the deceased, Stephen A. Mistich, be hereby recognized and substituted as party plaintiffs and appellees in the above entitled and numbered cause.

New Orleans, Louisiana, this 8th day of January, 1990.

(SIGNED) PATRICK M. SCHOTT
JUDGE

RESPECTFULLY SUBMITTED:

WIEDEMANN & FRANSEN

(SIGNED) WILLIAM N. HAZLARIS
LAWRENCE D. WIEDEMANN, T.A.
BAR #13457
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821 Baronne Street
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STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * *

ORDER

Motion to stay proceedings pending determination of proper party substitution is denied.

Motion to substitute Hettie M. Minnicks executrix of the Succession of Stephen A. Mistich is denied. *Nathan v. Touro Infirmary*, 512 So.2d 352 (La. 1987).

New Orleans, Louisiana, this 1st day of June, 1990.

(SIGNED) RFB, III
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

The Supreme Court of the State of Louisiana

STEPHEN A. MISTICH
VS.
NO. 90-OC-1241
PIPELINES INC. ET AL

- - - - - -

IN RE: Minnicks, Hettie M.; - Other(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 89-CA-1420; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703

- - - - - -

September 14, 1990

Denied.

JCW
WFM
JLD
LFC
PH

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
September 14, 1990

(SIGNED)
Deputy Clerk of Court
For the Court

(2)

NO. 90-1082

Supreme Court, U.S.
FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA STATE COURT OF APPEAL,
FOURTH CIRCUIT

BRIEF OF RESPONDENTS
IN OPPOSITION TO THE PETITION

Wiedemann & Wiedemann
Lawrence D. Wiedemann
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QUESTIONS PRESENTED FOR REVIEW

Whether the Louisiana Court of Appeal, Fourth Circuit erred in denying the motion to be substituted filed by the executrix of decedent's estate, after it had correctly substituted decedent's children as plaintiffs-appellees under state procedural law, and whether once conceding that the substitution was procedurally correct, the executrix may seek review to this Honorable Court.

LIST OF PARTIES

The parties involved include those set forth in the caption, as well as Brown & Root, Inc., an original defendant in this matter. The parent and subsidiary companies of Brown & Root, Inc. have been previously listed in the Petition for Writ of Certiorari.

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DECISIONS BELOW

1. Judgment in favor of original plaintiff Stephen A. Mistich in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, dated April 28, 1989.

2. Order of the Louisiana Court of Appeal, Fourth Circuit, substituting decedent's children as plaintiffs-appellees, dated January 8, 1990.

3. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the executrix's motion to be substituted, as well as denial of motion to stay proceedings filed by Brown & Root, Inc., dated June 1, 1990.

4. Denial by the Louisiana Court of Appeal, Fourth Circuit, of peremptory exception of no right of action filed by Brown & Root, Inc., dated September 4, 1990 (Appendix 1).

5. Denial by the Supreme Court of the State of Louisiana of application for supervisory and other writs filed by the executrix, dated September 14, 1990.

6. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the petition for intervention filed by the executrix, dated December 28, 1990 (Appendix 2).

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is questioned as the decision by the Louisiana Court of Appeal, Fourth Circuit on June 1, 1990 denying the executrix's motion to be substituted as the plaintiff-appellee and the subsequent denial by the Louisiana Supreme Court of the executrix's application for supervisory and other writs on September 14, 1990 involved merely the procedural substitution of parties in accordance with the state's appellate rules. Although the original lawsuit was brought under the Jones Act, 46 U.S.C. Section 688, the general maritime law, the "saving to suitors" clause, 28 U.S.C. Section 1333(1), the assertion by petitioner that the state procedural substitution conflicts with federal decisions, or even involves federal law, is disputed.

STATEMENT OF THE CASE

On December 2, 1986, Stephen A. Mistich (hereinafter sometimes referred to as "Mistich") filed suit in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, pursuant to the "saving to suitors" clause, seeking tort damages for his injuries against Brown & Root, Inc. and other defendants. Several weeks prior to trial, Mistich settled his claims against all co-defendants, except Brown & Root, Inc., and therefore released the former.

After a full trial on the merits lasting seven days, judgment was rendered on April 28, 1989 in favor of Mistich and against Brown & Root, Inc. awarding $3,147,000.00 in compensatory damages and imposing $4,000,000.00 in punitive damages. Reasons for Judgment, thoroughly explaining the trial court's decision, were issued on May 25, 1989.

Subsequent to the rendering of the judgment and prior to the issuance of the reasons for same, Mistich died.

Brown & Root, Inc. suspensively appealed to the Louisiana Court of Appeal for the Fourth Circuit on May 31, 1989.

On January 8, 1990, decedent's children, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, were substituted as proper party plaintiffs based upon Louisiana Code of Civil Procedure Article 801, Rule 2-9 of Uniform Rules of Louisiana Courts of Appeal, and Louisiana Civil Code Article 2315.1.

On March 12, 1990, the Court of Appeal entertained oral arguments by Brown & Root, Inc. and the aforenamed children on behalf of the decedent Mistich. No other representative of Stephen A. Mistich existed at this time.

On April 4, 1990, nearly one year after judgment was rendered and nearly one month after oral arguments were heard by the Court of Appeal, the executrix of decedent's estate was confirmed in such capacity and sought to be substituted as the sole proper party plaintiff-appellee.

Interestingly enough, while recognizing that this case arises under the Jones Act, 46 U.S.C. Section 688, and the general maritime law, the executrix conceded that Louisiana Code of Civil Procedure Article 801 and Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal, controlled the substitution of parties. (See Appendix 3.)

However, the executrix erred in relying upon Louisiana Code of Civil Procedure Article 801(2) and not 801(1). The executrix clearly misinterpreted Article 801 in support of her assertion that the estate was the correct party to be substituted for the decedent.

After supporting the applicability of Louisiana procedural law, the executrix changed horses and cited two federal maritime cases, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) and Connors v. Gallick, 339 F.2d 381 (6th Cir. 1964) as authority for her proper party status, citing the dissenting opinion of Justice Powell in Gaudet as authority.

On June 1, 1990, the Court of Appeal correctly denied the executrix's Motion to Substitute, citing Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987), a case fully supporting the position that Louisiana Code of Civil Procedure Article 801(2) applies strictly to property damage or contract cases, but not to personal injury cases.

On June 26, 1990, the executrix applied for supervisory and other writs to the Louisiana Supreme Court, which writs

were denied on September 14, 1990, further confirming that the children of Mistich are the proper parties in interest to this lawsuit.

On September 4, 1990, the Court of Appeal, in denying Brown & Root, Inc.'s Peremptory Exception of No Right of Action, ruled:

MOTION IS DENIED.

> The peremptory exception of no right of action brought by Brown & Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment.
>
> * * *
>
> This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.
> (See Appendix 1.)

Having been unsuccessful in her prior attempts to be recognized as the real party in interest and justly so, on November 14, 1990, the executrix planned a new strategy, couched her arguments in new terms, and filed a different pleading (Motion to Intervene) all in an effort to accomplish the same goal.

However, this time, the executrix pulled out all of the stops. After conceding:

> "As the children themselves have argued 'clearly this is a La. C.C.P. Article 801 substitution and a

> procedural matter governed by the law of the forum (Louisiana).' . . . We suggest that they are correct."
> (See Appendix 4),

the executrix lent a significant portion of her supporting memorandum to matters both irrelevant and which were neither in the record nor before the Court of Appeal.

In sheer desperation, the executrix referred to a will that purportedly left Mistich's sole surviving children next to nothing, thus deliberately insinuating a negative relationship between the decedent and his children, seeking to invoke prejudice. Although respondents vehemently dispute such a relationship, this discussion is germane to no aspect of this appeal and has absolutely no relevance in this Honorable Court's decision-making process. The conclusion that the executrix's motive was to invoke prejudice is inescapable given the fact that in prior pleadings the executrix admitted:

> "Mr. Mistich's testacy or intestacy is completely irrelevant to the legal issues in the appeal of this case to this Court. Brown & Root, Inc.'s motion for a stay does not and cannot expressly assign any actual legal significance herein to the will. Indeed, there is none."
> (See Appendix 5.)

Therefore, as expected, on December 28, 1990, the Court of Appeal denied the executrix's Motion to Intervene, ruling that in accordance with La. C.C.P. Article 801 and La. C.C. Article 2315.1, the proper parties to be substituted as the legal successors are the children of Mistich.

Now the executrix seeks writs to this Honorable Court asking that, despite correct rulings by the Court of Appeal and the

Louisiana Supreme Court regarding substitution of parties, this Court determine new issues not addressed by the courts below.

SUMMARY OF ARGUMENT

The decision of the Louisiana Court of Appeal, Fourth Circuit, denying the motion of the executrix of decedent's estate to be substituted in place of decedent in the appeal of his personal injury lawsuit, following the proper substitution of decedent's children, was correct, as was the denial of the executrix's subsequent application for supervisory or other writs to the Court of Appeal, Fourth Circuit, by the Louisiana Supreme Court. As the executrix has petitioned this Honorable Court in response to the denial of her motion to be substituted, it is the denial of this procedural substitution alone that is before the Court.

The Court of Appeal correctly applied Louisiana appellate procedural law to this state court action and this has been judicially admitted by the executrix in her attempt to intervene in this matter. In fact, although the executrix has consistently argued for the application of state procedural law at the state court level, upon being confronted with an unfavorable determination therefrom, she now seeks to deny its applicability and contradicts herself by invoking the assistance of federal substantive and procedural law. Clearly, since even the executrix acknowledges that the procedural substitution by the Court of Appeal was correct, any review of such a determination at this level should be moot.

Furthermore, contrary to petitioner's argument, respondents submit that federal uniformity is in no way compromised by the decisions of the state court, nor is federal procedural law even applicable in this matter. It is further submitted that federal procedural law would not produce an inconsistent result in this matter. The Louisiana courts properly denied the executrix's

motion to be substituted under the relevant procedural articles and such action does not warrant review by this Honorable Court.

ARGUMENT

It is axiomatic that state procedural rules govern actions in state courts under the "saving to suitors" clause (28 U.S.C. Section 1333(1)). See Exxon Corp. v. Choo, 817 F.2d 307 (5th Cir. 1987) (reversed on other grounds), 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed 2d 127 (1988).

Consequently, on January 8, 1990, the sole surviving children of Stephen A. Mistich were properly substituted upon his death as plaintiffs-appellees according to Louisiana Code of Civil Procedure Article 801(1), Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal, and Louisiana Civil Code Article 2315.1.

Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal specifically provides that:

> The rules and procedures for substitution of parties provided by LSA-C.C.P. Arts. 801-807 shall regulate the substitution of parties.

La. C.C.P. Article 801 incorporates Louisiana Civil Code Article 2315.1 for the purpose of determining the proper parties to be substituted. Even the executrix of the estate of Stephen Mistich has previously admitted that this matter involves a La. C.C.P. Article 801 substitution of parties, although she contends she is the proper party. (See Appendix 3.)

La. C.C.P. Article 801 provides:

> **Voluntary substitution for deceased party; legal successor**

> When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.
>
> As used in Articles 801 through 804, "legal successor" means:
>
> (1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and
>
> (2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein. (Emphasis added).

Louisiana Civil Code Article 2315.1 entitled, "Survival action" states:

> A. If a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense, shall survive for a period of one year from the death of the deceased in favor of:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children;

(2) The surviving father and mother of the deceased, or either or them if he left no spouse or child surviving; and

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

B. In addition, the right to recover all damages for injury to the decedent, his property or otherwise, caused by the offense or quasi offense, may be urged by the decedent's succession representative in the absence of any class of beneficiary set out in the preceding Paragraph.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively. (Emphasis added).

Additionally, the Federal Employees Liability Act, 45 U.S.C. Section 59, incorporated by specific reference into the Jones Act (46 U.S.C. 688), entitled, "Survival of right of action of person injured", provides:

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin

> dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

There is no material difference between Louisiana law and applicable federal law when it comes down to a determination of what takes place when an injured person dies.

Stephen A. Mistich died following the rendition of judgment without a surviving spouse and, accordingly, under La. C.C. Article 2315.1 and 45 U.S.C. Section 59 his three surviving children are his legal successors to the exclusion of any other ascending or collateral survivors, and, as such, are entitled to be substituted as parties plaintiff under La. C.C.P. Article 801. The federal statute is cited merely for the purpose of showing to the Court that the Mistich children are the beneficiaries under both federal and state law and not in any way to imply that federal law is controlling. This is a state court action authorized under the "saving to suitors" clause, and state procedural law is applicable just as federal procedural law would be applicable in a diversity case filed in a federal forum.

Accordingly, the succession representative has no role in this case since Louisiana Civil Code Article 2315.1, incorporated in La. C.C.P. Article 801, requires the designated beneficiaries to appear in personam. Under the Louisiana procedure, the succession representative is permitted to take part only in the "absence of any class of beneficiaries" set forth in La. C.C. Article 2315.1. (See La. C.C. Article 2315.1(B) and La. C.C.P. Article 801.) The substituted children are, of course, a primary class of beneficiaries under La. C.C. Article 2315.1.

The executrix previously alleged to the Court of Appeal in her motion to be substituted that she is the proper party plaintiff under applicable Louisiana law citing La. C.C.P. Article 801(2). A literal reading of that section will disclose its inapplicability to

the instant matter because of the presence of designated beneficiaries. Additionally, the courts of Louisiana have consistently held that La. C.C.P. Article 801(2) applies strictly to property damage or contract cases, but not to tort personal injury cases like the present. Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987). The Court of Appeal recognized this and made no error in its determination of the proper parties to be substituted.

After supporting the applicability of Louisiana procedural law, La. C.C.P. Article 801, in her original Motion to Substitute, the executrix changes horses and cites two federal maritime cases, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974) and Connors v. Gallick, 339 F.2d 381 (6 Cir. 1964), as authority for her alleged proper party status, citing the dissenting opinion of Justice Powell in Gaudet as authority. Gaudet was a death action by a widow of a longshoreman. The longshoreman had recovered during his lifetime for personal injuries and the threshold question was the right of a survivor to assert a wrongful death action in addition to the previously concluded personal injury action. The present case is not a death action by a survivor, but a personal injury action by a seaman. Gaudet stands for the proposition that the surviving children of Mistich may have a viable death action in addition to his personal injury action but that cause of action, if any, is not before this Court. Gaudet says nothing that is germane to the issues presented herein.

Connors v. Gallick, 339 F.2d 381 (6 Cir. 1964) in dicta makes the statement that a personal injury judgment under the FELA belongs to the estate of the deceased plaintiff in judgment. First, Connors is not a state court action. Second, a careful reading of the case will disclose that the widow and executrix of the estate entered into a settlement on behalf of herself and all heirs of the decedent and the real issue was the validity of the settlement under attack by a questionable daughter. The Court held the settlement by the obvious beneficiary to be valid. This

case does not in any way tarnish the clear intent of La. C.C.P. Article 801, La. C.C. Article 2315.1 and 45 U.S.C. Section 59, or the established jurisprudence mandating that the rights of survivors under federal, or state law, do not form a part of a decedent's estate. Connors is clearly an aberration under the well-established law that the cause of action which survives under the FELA provision does not survive for the benefit of the decedent's estate, but for the listed beneficiaries in the order specified. 45 U.S.C. Section 59; Hogan v. New York Central R. Co., 223 F 890 (D.C.N.Y. 1915).

In connection with the aforementioned argument, it is imperative to point out that the executrix has petitioned this Honorable Court solely to review the denial of her motion to be substituted. No other substantive issue is presented, petitioner's discussions to the contrary notwithstanding. The executrix judicially admits that the Court of Appeal's determination was merely a procedural one and even suggests that it was correct. Yet, she paradoxically seeks relief from this Honorable Court. It is submitted that, in light of these circumstances, no review is warranted by this Honorable Court.

Furthermore, as previously mentioned, it is interesting to note that the executrix has asserted the application of state procedural law throughout her involvement in the appeal of this matter. It is only after she has been unsuccessful in her attempts to have herself substituted through state law that she asserts the applicability of federal substantive and procedural law. It is with this change of heart that she appears before this Honorable Court with hopes of laying claim to the significant monetary judgment to which decedent's children are rightly entitled. Her intentions are readily apparent and should not be supported.

Finally, the executrix argues in her petition that federal uniformity would be served should she be substituted as the plaintiff-appellee. This argument is merely a "red herring" to

persuade this Honorable Court to review the proper determination made by the Louisiana appellate court. There clearly is no federal issue involved here, much less any conflict with federal decisions. A procedural substitution of parties has been accomplished in state court, applying state law, in order that the personal injury action of a plaintiff who died pending appeal could continue forward to a definitive judgment. This substitution, it is respectfully submitted, was correctly executed by the Louisiana appellate court with no damage to any body of federal law, and therefore this action need not be reviewed.

CONCLUSION

Applying state procedural rules pursuant to the "saving to suitors" clause, which it was bound to do, the Louisiana Court of Appeal for the Fourth Circuit properly substituted the sole surviving children of Stephen Arthur Mistich in his stead upon his death after he had obtained a personal injury judgment, but while the matter was on appeal.

The executrix of decedent's estate, while conceding the correctness of the Court of Appeal's ruling, now contends, improperly, that federal procedural and substantive law controls substitution of parties, all in an effort to obtain the fruits of a judgment not rightfully hers.

Respectfully submitted,

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Counsel for Respondents

APPENDIX 1

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

MOTION IS DENIED.

The peremptory exception of no right of action brought by Brown and Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment. This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.

New Orleans, Louisiana this 4th day of September, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Bernard Armstrong

APPENDIX 2

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Bernard Armstrong

APPENDIX 3

FOURTH CIRCUIT COURT OF APPEALS

STATE OF LOUISIANA

No. 89-CA-1420

STEPHEN A. MISTICH

VS.

PIPELINES, INC. ET AL

ON APPEAL FROM THE 25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES, NO. 29-703, DIVISION "B", JUDGE EMILE E. MARTIN, III PRESIDING

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE PARTY

MAY IT PLEASE THE COURT:

Mover, Hettie M. Minnicks is the mother of the deceased original plaintiff, Stephen A. Mistich, and the executrix of the Succession of Stephen A. Mistich in Louisiana. Under Louisiana Code of Civil Procedure Articles (La.C.C.P. Art.) 426 and 801(2), the latter made applicable by La.C.C.P. Art. 821 and Uniform Rules, Courts of Appeal, Rule 2-9, mover is the sole proper party plaintiff-appellee to be substituted herein.

La.C.C.P. Art. 426 reads:

> **Transmission of Action and Right to Enforce Obligation**
>
> An action to enforce on obligation is the property of the obligee which of his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title, except as otherwise provided by law.

La.C.C.P. Art. 801 reads:

> **Voluntary Substitution for Deceased Party; Legal Successor.**
>
> When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.
>
> As used in Articles 801-804, "Legal Successor" means:
>
> (1) The survivors designated in Article 2315.1 of the Civil Code, if the action survives in their favor; and
>
> (2) Otherwise, it means the succession representative of the deceased appointed by a Court of this state, if the succession is under administration therein; or the heirs

> and legatees of the deceased, if the deceased's succession is not under the administration therein.

Since a judgment was rendered on April 28, 1989 in favor of original plaintiff, Stephen A. Mistich, while he was alive and before his May 14, 1989 death, there is no survival action which existed under Article 2315.1 of the Louisiana Civil Code, contrary to the January 4th, 1990 Motion for Substitution of Parties of Brandon Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich as natural tutrix of Shawn A. Mistich, the original plaintiff's adopted children.

The case herein arises, not under Articles 2315 or 2315.1 of the Louisiana Civil Code, but under the Jones Act, 46 United States Code (USC) 688 and the general maritime law.

Nathan vs. Touro Infirmary, 512 So.2d 352,353 (La. 1987), a La.C.C. Art. 2315 case, does apply here to the extent it characterizes an action commenced before the original plaintiff's death as "a property right that was transmitted upon his death to his heirs or legatees". Nathan at 355 cites J. Wilton Jones Co. vs. Liberty Mutual Insurance Co., 248 So.2d 878, 892 and confirms the correctness of the earlier case in finding that in La.C.C.P. Art. 801(2), the "Otherwise" in that article can reasonably be read to cover situations where, as here, there is not a La.C.C. Art. 2315 personal injury suit involved.

The reply brief on behalf of Stephen A. Mistich at page 24 relies upon Robertson vs. Wegmann, 985 S.Ct. 1991, 436 U.S. 584, 56 L.Ed. 554 (1978) for the erroneous assertion that the adopted children were the proper parties to be substituted. Robertson held that a 42 USC 1983 civil rights action, commenced by plaintiff Shaw, but not brought to judgment before his death, would be governed by La.C.C. Art. 2315's survivorship rules.

This case's holding has been confined to its narrow fact situation, and would not apply to the case herein. See Ashcraft vs. Louisiana Coca-Cola Bottling Co., Ltd., 658 F. Supp. 772 (E.D. La. 1987) at page 774, note 1, stating Robertson "holds only that the abatement of a Section 1983 action be a plaintiff who died without relatives did not, in those narrow circumstances, make state law inconsistent with federal law." Ashcraft also holds La.C.C. Art. 2315.1 is limited to the causes of action for offenses and quasi offenses in Articles 2315 through 2324.

The fact situation here does fall under the holding of Connors vs. Gallick, 339 F.2d 381 (6 Cir. 1964), a Federal Employers Liability Act (FELA) (45 U.S.C. 51) case which involved a railroad employee who died after receiving a trial court judgment, raising the question of whether the survivorship provision of the FELA (45 U.S.C. 59) applied to a settlement by the employee's estate to the exclusion of his daughter. This survivorship provision is incorporated by reference into the Jones Act. The court held that the survivorship provision did not apply and that the judgment and resulting settlement belonged to the employee's estate:

> Gallick in his lifetime had prosecuted his own cause of action to judgment, and his death did not abate his action or vacate his judgment.
>
> ***
>
> Gallick dies possessed not of an unlitigated cause of action, but of a judgment which became part of his estate.

Also see Kirby vs. Albert T.J., 517 So.2d 974 (La.App. 3 Cir. 1987), confirming that a plaintiff's death, after trial court judgment and pending appeal, merges the plaintiff's action into a final judgment so that neither could the action lapse nor the

judgment fall be the death of the plaintiff.

Miles vs. Melrose, 882 F2d 976 (5th Cir. 1989), cited at p. 13 of the original brief on behalf of Brown & Root, Inc., is decisively distinguishable from the case at hand. Melrose concerned actions for wrongful death and survival brought by the decedent's mother for herself and the decedent's estate, and was not, as here, an action for injuries prosecuted to judgment by the seaman himself.

Accordingly, this Court is urged to substitute mover, Hettie M. Minnicks, as executrix of the succession of original plaintiff Stephen A. Mistich, herein as the sole and proper party plaintiff appellee.

Respectfully submitted,

(SIGNED) FRANK H. WALK, JR.
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APPENDIX 4

COURT OF APPEAL FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1420

Stephen A. Mistich
Plaintiff Appellee/Cross - Appellant

vs.

Brown & Root, Inc.
Dependant - Appellant

MEMORANDUM IN SUPPORT OF PETITION OF INTERVENTION

* * *

Thus, in light of the above, this court, in applying state law to the question of substitution, must be considered to have treated it as a mere procedural questions not requiring the application of federal maritime law in this saving to suitors clause case. Therefore, the only question decided in the order of June 1, 1990 had to do with mere standing to continue the action (procedural capacity) and not with the ultimate beneficiary in interest. It had to do with mere representative standing. As the children themselves have argued "Clearly this is a La.C.C.P. Article 801 substitution and a procedural matter governed by the law of the forum (Louisiana)." Opposition To Motion To Stay Proceedings Pending Determination of Proper Party Substitution, page 85. The children repeat this judicial admission throughout their previous Opposition. Id at 82, 83, 85. We suggest that they

are correct. That this is all that was previously decided by this Court and that the children have judicially admitted it.

* * *

Respectfully submitted,

(SIGNED) FRANK H. WALK, JR.
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Certificate of Service

I hereby certify that a copy of the foregoing has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid and properly addressed, this 14th day of November, 1990.

(SIGNED) FRANK H. WALK, JR.

APPENDIX 5

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 89-CA-1420

STEPHEN A. MISTICH

Plaintiff-Appellee/
Cross-Appellant

VS.

BROWN & ROOT, INC.

Defendant-Appellant

MEMORANDUM IN OPPOSITION TO
BROWN & ROOT, INC.'S MOTION TO STAY

MAY IT PLEASE THE COURT:

* * *

Defendant-appellant Brown & Root, Inc. in its motion to stay discusses the existence of a last will and testament left by the decedent Stephen A. Mistich. However, the existence of a will does not support in any way the motion for a stay. Mr. Mistich's testacy or intestacy is completely irrelevant to the legal issues in

the appeal of this case to this Court. Brown & Root's motion for a stay does not and cannot expressly assign any actual legal significance herein to the will. Indeed there is none.

* * *

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid and properly addressed, this 15th day of May, 1990.

(SIGNED) FRANK H. WALK, JR.

Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

NO. 90-1082

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE LOUISIANA COURT OF
APPEAL, FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUMMARY OF THE CASE

Petitioner on December 13, 1991 filed her petition to this Court for a writ of certiorari to the Louisiana Court of Appeal, Fourth Circuit. This state court had refused to substitute Petitioner, as the executrix of the estate of a deceased seaman, in a Jones Act and general maritime law *personal injury* case on appeal, in which the seaman *before his death* had been awarded a final trial court judgment. Instead the state court, utilizing state law, had substituted the tort *survival* action beneficiaries, although no survival action was involved. The motions and briefs of all parties had treated this substitution issue as determining not merely 1) the party having *procedural* capacity, but also 2) the party to be the *substantive* beneficiary of the judgment.

Yet there was no opinion accompanying the Court of Appeal's decision which had only stated that the motion "is denied" and cited *Nathan v. Touro Infirmary*, So.2d (La. 1987), a state law tort *survival* action case. See Petition for Writ of Certiorari (hereafter "Petition"), Appendix, page A-6. The court did not expressly hold that the parties ordered substituted had merely procedural capacity nor that the seaman's estate would be the ultimate substantive beneficiary of the judgment. The full extent of the court's holding was unclear.

Petitioner on November 14, 1990 filed in the Court of Appeal a petition of intervention. This was done out of an abundance of caution, and in order to obtain clarification from the Court of Appeal as to whether its decision denying Petitioner's substitution determined not only 1) The proper *procedural* party, but also 2) the *substantive* beneficiary of the judgment. Petitioner's intervention asserted the applicability of Federal maritime law to the seaman and his estate's substantive maritime rights, which would at least give Petitioner the right to intervene in the appeal as the substantive beneficiary in interest of the seaman's judgment rights. This intervention was premised on the position that the Court of Appeal decision at most could have

determined only the party having procedural capacity to appear in the case.

The Court of Appeal's December 28, 1990 denial of Petitioner's intervention thus clarified that its prior denial of Petitioner's motion to substitute did determine *both* the procedural party and the substantive beneficiary. The court's decision stated that under cited Louisiana law "the proper party to be substituted as the legal successor are the children of the deceased plaintiff." (See Appendix, page A-1).

ARGUMENT

Respondents' Opposition for the first time raises arguments which must now be addressed.

In Respondent's Brief in Opposition to the Petition (hereafter "Opposition"), Respondent states on page vi in the Statement of Jurisdiction that the Louisiana Court of Appeal's denial of Petitioner's motion to substitute "involved merely the procedural substitution of parties." The purpose of such a statement is to mischaracterize the question involved as merely "procedural" so that Federal maritime law perhaps may not be applicable. But this mischaracterization, made throughout the Opposition, is not tenable.

The Louisiana Court of Appeal, in denying the executrix's intervention, expressly regarded the question involved as one, not of mere procedural capacity, but as dealing with the substantive question of the ultimate beneficiary in interest, the "legal successor." The state court relied on state law.

Now it is perfectly clear that the state court had used state law, contrary to settled Federal law, to deny Petitioner her substantive Federal maritime right.

Respondents mistakenly state (Opposition, page 2) that Petitioner "conceded" that Louisiana law "controlled the substitution of parties." Yet a reading of Petitioner's memorandum

to the Court of Appeal shows Petitioner argued that *both* Federal and state law provided that she as executrix of the estate was the proper party to be substituted. See Opposition, Appendix 3. Petitioner's subsequent writ application to the Louisiana Supreme Court also argued that *both* Federal and state law required her substitution. (See herein, Appendix, page A-2).

Respondents also mistakenly argue (Opposition, pages 3,4,5, and 11) that Petitioner's Memorandum in Support of Petition of Intervention conceded that the substitution issue was a procedural issue governed by state law. Yet a reading of even the short excerpt of the document which Respondents included as their Appendix 4 shows, to the contrary, that Petitioner intervened on the premise that Federal maritime law must apply to a seaman's substantive maritime rights, so the state court *at most* could have decided only the issue of *procedural* capacity. (See Respondents' Appendix 4, page A-9).

Respondents discuss (at Opposition, page 4) the relevancy of the deceased plaintiff's will. Petitioner is there quoted from her opposition to the defendant-appellant's motion, for a stay of the appeal, which had relied upon the will as a reason for granting a stay. The point being made by Petitioner was that the deceased's testacy or intestacy was not relevant to determining his estate as the proper party to be substituted. In either case the judgment rights belonged to the estate.

Respondents claim that Petitioner is asking this Court to "determine new issues not addressed by the courts below" and that "it is the denial of this procedural substitution alone that is before the Court." (Opposition, pages 5 and 11). Yet Petitioner's Petition for Certiorari at pages 9 and 10 expressly posited, and the state court has now confirmed, that its denial of Petitioner's motion to be substituted for the deceased seaman was indeed a denial of both Petitioner's procedural capacity and also a denial of the estate's substantive Federal maritime rights in the judgment.

The Respondents have mischaracterized this matter not only by considering this a question of mere "procedure," but also by variously considering this a question of "survival".

They rely on state and Federal survival statutes to justify substituting themselves as ultimate beneficiaries, but also imply that it is not a question of survival, but of mere procedure, to justify applying state law to this Federal maritime action under the saving to suitors clause.

This survival mischaracterization also appears throughout Respondents' Opposition. For instance, in saying that "[t]here is no material difference between Louisiana law and *applicable federal law* when it comes down to a determination of what takes place when an injured person dies." (Opposition, page 9, emphasis added.) Referring to this Federal law, Respondents cite 45 U.S.C. Section 59, the *survival* provision of the Federal Employers Liability Act (FELA), and even quote its title: "*Survival* of right of action of person injured." (emphasis added.)

Respondents keep returning to "survival" because this is the only way they, the survival beneficiaries, would have rights here. But they would have rights only if this would be a survival case. This is definitely not a survival case.

Respondents cite, as the Federal equivalent to the state procedural law on which they rely, the FELA Section 59 "survival" provision. Again, they tell us that there is no "material difference between Louisiana law and applicable federal law." Thus, Respondents treat this as a survival question, which of course it is not since the deceased reduced his action to judgment before he died. In contrast, FELA Section 59 addresses the survival of a right of action, which would no longer survive after being merged into a judgment.

In denying that this is a survival case, and at the same time referring to FELA Section 59 as the Federal equivalent to the applied state law, Respondents are erroneously implying that Section 59 does not deal with the survival of actions.

Yet, since this is not a survival case, and since therefore

Section 59 of the FELA is not applicable, there can be no equivalence between state and Federal law demonstrated by reference to Section 59, the Federal survival provision. And if Respondents are treating this as a question of survival of actions in order to be substituted as ultimate beneficiaries, then Respondents are clearly wrong. Again, this is not a case of survival, in which an injured seaman would have died *before* merging his cause of action into a final judgment.

Contrary to what Respondents assert, *Connors v. Gallick,* 339 F.2d 381 (6th Cir. 1964), is applicable to the question herein. In *Connors* the question presented was whether a child of the deceased had a right to participate in a settlement by the deceased's widow as executrix of his estate. If there was a survival action under FELA Section 59, then a child of the deceased would have such a right as a survival beneficiary. But if the personal injury judgment, recovered by the deceased before his death, was simply an asset of his estate, then of course the executrix could freely settle without the daughter's participation. The *Connors* court stated the question was:

> [W]hether Gallick's death while the motion for a new trial was pending brought into existence a survival cause of action in which [the child] became such a beneficiary as to be entitled to participate in the settlement fund. (339 F.2d at 382)

The court held that Section 59 was inapplicable because there was no survival cause of action. The court further stated:

> Gallick's cause or causes of action having been merged in his judgment * * * Gallick's death did not convert his judgment into a cause of action to be prosecuted for the benefit of his widow and the plaintiff as his child. (339 F.2d at 386)

The court held the judgment settlement proceeds to be part of the deceased's estate.

Thus *Connors* is not an "aberration" from the FELA

Section 59 survivorship provision, as Respondents argue. Rather, *Connors* is not a survival case at all, and neither is the present case. Yet Respondents state:

> This case [*Connors*] does not in any way tarnish the clear intent of La. C.C.P. Article 801, La. C.C. Article 2315.1 *and 45 U.S.C. Section 59* or the established jurisprudence mandating that the rights *of survivors under federal*, or state law, do not form a part of decedent's estate. *Connors* is clearly an aberration under the well-established law *that the cause of action which survives under the FELA* provision does not *survive* for the benefit of the decedent's estate, but for the *listed* [in Section 59] beneficiaries in the order specified. *45 U.S.C. Section 59. Hogan v. New York Central R. Co.*, 223 F.890 (D.C. N. Y. 1915) (Opposition, pages 10-11, emphasis added).

Note *Hogan* is a survival action case in which the railroad worker died at work and no suit or judgment existed prior to his death. Respondents in this quote are clearly speaking about survival of actions. This illustrates Respondents' mischaracterization of this case as a survival case. Only by treating this as a survival case, of course, can Respondents argue that survival beneficiaries should be substituted as ultimate beneficiaries.

CONCLUSION

This question of post-judgment substitution of parties is neither a matter of mere procedure nor a matter of survival of a right of action. Thus a writ of certiorari should be issued, or summary reversal ordered, to remedy the state court's refusal to follow controlling Federal maritime law in this saving to suitors clause, Jones Act and general maritime law case.

Respectfully submitted,

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APPENDIX

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Bernard Armstrong

STATE OF LOUISIANA

SUPREME COURT

NO. 90-C-1241

STEPHEN A. MISTICH

VS.

BROWN & ROOT, INC.

From the Court of Appeal, Fourth Circuit No. 89-CA-1420

APPLICATION FOR SUPERVISORY WRIT, OR ALTERNATIVELY,

WRITS OF MANDAMUS, PROHIBITION AND REVIEW (SUPPLEMENTAL)

Hettie M. Minnicks, as executrix of the succession of the deceased original plaintiff, Stephen A. Mistich, hereby applies for a supervisory writ, or alternatively for writs of mandamus, prohibition, and review based on the following.

* * *

ASSIGNMENT OF ERRORS

The Court of Appeal erred in refusing to substitute as the sole proper party plaintiff-appellee the executrix of the succes-

sion of the original plaintiff, who had died after obtaining judgment on his Jones Act and general maritime law, personal injury claims.

ARGUMENT

a. Federal maritime claims in state court under Saving to Suitors clause as to substantial rights must be governed by Federal law.

The original plaintiff seaman brought his Federal Jones Act and general maritime claims in the Louisiana State Court under the Saving to Suitors clause, 28 U.S.C. 1333. In this situation, this Court in *Lavergne vs. Western Co. of North America, Inc.*, 371 So.2d 809 (La. 1979), concerning a seaman's right to a jury trial, has stated:

> The federal substantive admiralty or maritime law applies if the claim is one cognizable in admiralty. *Atlantic & Gulf Stevedores, Inc. vs. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); *Pope & Talbot, Inc. vs. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Garrett vs. Moore-McCormack Company*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

There this Court at page 810 further stated:

> It has long been established that a state court, having concurrent jurisdiction with the federal courts as to *in personam* admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law. (citation omitted).

Most recently this Court, in *Neely vs. Hollywood Marine, Inc.*, 530 So.2d 1116 (La. 1988), held at page 1123, "Sub-

stantive maritime law controls in state court and the state cannot, by its procedural practice, substantially alter the rights of litigants under substantive maritime law." (citations omitted).

The Federal jurisprudence is the source for this law. See *Garrett vs. Moore-McCormack Company*, supra, a Jones Act and general maritime law case originally heard in state court under the Saving to Suitors clause where, in prohibiting application of Pennsylvania state law to determine validity of a release, the Court stated:

> If in its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.
> ***
> So here, in hearing this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

In *Chelentis vs. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 502, 62 L.Ed. 1171 (1918), it was held that the measure of personal injury damages recoverable by a seaman was determined by federal maritime, not New York state law whose application "would be destructive of the 'uniformity and consistency at which the Constitution aimed'" for interstate commerce.

Similarly, in *Pope*, supra, denying the application of Pennsylvania state contributory negligence in place of maritime comparative negligence, it was stated:

> While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.

Offshore Logistics, Inc. vs. Tallentire, 447 U.S. 242, 106 S.Ct. 2485, 91 L.Ed.2d 202, discussing the Saving to Suitors clause stated that state and federal courts exercising jurisdiction under that clause "were obliged to apply governing federal substantive law in resolving those claims to the extent state common law remedies conflicted with governing federal maritime law."

In *J.B. Efferson Co. vs. Three Boys Corp.*, 238 F.2d 611, 615 (5th Cir. 1956), holding a state time limitations statute inapplicable, defined "maritime law", for purposes for the Saving to Suitors clause, as "Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction have declared and would apply."

b. Federal law creates and protects the substantive right of the executrix.

Had this case been heard in the Federal courts, Federal Rule Of Appellate Procedure 43, Substitution of Parties, subpart (a), "Death of a Party" would require the "personal representative of the deceased party", here the succession executrix, to be substituted as a party in place of the original plaintiff.

Substantive law according to *Black's Law Dictionary* (5th Ed.) is "That part of law which creates, defines, and regulates rights...that which creates duties, rights, and obligations." In the instant case the executrix's right of action is her primary and most substantive right, and so her right of action is created by federal substantive law. **This is true whether or not the rule of substitution of parties be described as a "proce-**

dural" rule. See the conflicts of law authorities cited in subsection c. below.

F.R.A.P. Rule 43 was in effect at the time of *Stein vs. Sea-Land Services, Inc.*, 440 F.2d 1181 (1971) where as here the seaman had received a trial court judgment in his lifetime for his personal injuries under the general maritime law of unseaworthiness. While the judgment was on appeal the seaman died, as here. Thereafter his widow and administratrix of his succession was substituted for the decedent as plaintiff-appellee and the case was affirmed in her favor. This case preceded the later case where the widow for herself asserted additional claims for wrongful death and survival causes of action in *Sea-Land Services, Inc. vs. Gaudet*, 514 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). There Justice Powell in his dissent at 94 S.Ct. 828, Note 23, referred to the prior case and noted without objection that "because Gaudet's death intervened between the jury verdict and the appeal, his recovery went directly to his estate, not to him personally."

As to the substitution of a party in the Jones Act portion of the claim, the fact situation here falls under the holding of *Connors vs. Gallick*, 339 F.2d 381 (6th Cir. 1964), a Federal Employers Liability Act (FELA) (45 U.S.C. 51) case which involved a railroad employee who died after receiving a trial court judgment, raising the question of whether the survivorship provision of the FELA (45 U.S.C. 59) applied to a settlement by the employee's estate to the exclusion of his daughter. This survivorship provision is incorporated by reference into the Jones Act. The court held that the survivorship provision did not apply where the employee died after rendition of the judgment and pending appeal. The judgment and the resulting settlement belonged to the employee's estate, the court stating:

> Gallick is his lifetime had prosecuted his own cause of action to judgment, and his death did not

abate his action or vacate his judgment.

***

Gallick died possessed not of an unlitigated cause of action, but of a judgment which became part of his estate.

Also see *Taylor vs. Taylor*, 232 U.S. 363, 34 S.Ct. 350, 58 L.Ed. (1914), a FELA wrongful death and survival actions case holding that the New York state succession law was pre-empted by the FELA grant of the right of action to specified parties. Similarly in our case Federal law clearly grants a substantive right of action to the executrix, and this right is supreme over any contrary law of the state of Louisiana, the forum court.

* * *

c. Conflicts of laws principles support the executrix's position.

Also note an underlying conflicts of law situation exists, and the authorities support the executrix's position. See *Restatement (Second) of Conflict of Laws*, Section 122, Comment a., discussing the application of forum local law rather than the law of the jurisdiction under which the right originated. One factor favoring the original jurisdiction's law would be if the application of the local law "would be likely to affect the ultimate result of the case." A second factor, the classification of the issue as "substantive, also favors applying the original jurisdiction's law (here federal). The other two factors discussed are not relevant here. Also see *Restatement* Section 125, Comment a., stating "the local law of the forum as such will not...be applied when its application would substantially affect the rights and duties of the parties. Also see Edward S. Stimson, *Conflict of Laws (1963)* stating at page 28 "the true objective of conflict of laws rules is that the outcome of the suit should be the same regardless of the jurisdiction in which it is brought." And on page 29 stating "if there is doubt as to whether the law applied will

affect the result, the law of the forum should not be applied."

Finally, see W. Cook, *"Substance" and "Procedure" and the Conflict of Laws*, 42 Yale L. J. 333 (1933) at page 344 characterizing the correct test as "How far can the court of the forum go in applying the rules taken from the foreign system of the law without unduly hindering or inconveniencing itself?" At page 349 Cook distinguishes between primary rights, secondary rights, (both considered substantive) and tertiary (or procedural) rights having to do with the mode of enforcing the prior existing rights. In the instant case the executrix's right of action, her right to be substituted as the sole party, is clearly substantive and may not be rightfully taken from her under some state forum procedure alleged to be applicable.

d. Alternatively, the executrix is the proper party to be substituted under state law.

Alternatively, assuming arguendo that Louisiana state law should apply to the substitution of parties, the same result would obtain in favor of the executrix.

This is not a survival action nor a wrongful death action. This is an action for personal injuries prosecuted through trial and to judgment by the original plaintiff himself. Also it should be kept in mind that plaintiff's actions were not under Louisiana Civil Code Article 2315 nor under any other articles of that chapter of the Civil Code entitled "Of Offenses and Quasi Offenses".

* * *

f. Conclusion

For these reasons this Court is urged to grant a supervisory writ, or alternatively, writs of prohibition, mandamus, and review

to remove the adopted children as parties plaintiff-appellee herein, and further to substitute as the sole proper party plaintiff-appellee Hettie M. Minnicks as the executrix of the succession of Stephen A. Mistich.

Respectfully submitted:

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